No. 15,987

IN THE

United States Court of Appeals

For the Ninth Circuit

ELMER J. FAUL and SYBELL E. FAUL,
Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

**Petition to Review a Decision of
The Tax Court of the United States.**

Honorable Ernest H. Van Fossen, Judge.

PETITIONERS' REPLY BRIEF.

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PETITIONERS' REPLY BRIEF.

Petitioners' case was presented, with reference to transcript, on pages 2 to 16 of their opening brief. The facts in issue, as given in their opening statement of the case, will not be repeated here.

Respondent's statement of the case (pages 2 to 7 of its brief) is bottomed on the assumption that Revenue Agent Shurlock's testimony, however illogical, unlikely and contrary to common sense, must be accepted as true. There is a further assumption made by respondent's statement of the facts, that the testimony of petitioners' witness, however logical and fair

it may appear, ought to be disregarded. The transcript of the case does not support respondent's contention and does not permit, as we believe, the assumptions made by respondent.

I.

IN SIMPLEST TERMS PETITIONERS CLAIM THAT HUSBAND EXPENDED MORE THAN 36 MONTHS IN PROVIDING RESPONDENT WITH THE INFORMATION ON THE BASIS OF WHICH A TAX DEFICIENCY WAS SUCCESSFULLY ENFORCED.

On pages 20 to 27 of their original brief, petitioners demonstrated that husband contacted the Internal Revenue Service in San Francisco in connection with the alleged fraudulent practices of his employer in February or March 1944; he was advised, and accordingly, he did keep records of the alleged fraudulent practices from that date on. He made copies on his own time, either at his home or late at night at the office. (Tr. 49-50.) In March 1946 husband was discharged from his employment with the fraudulent taxpayer, and in February 1947 he went again to the Internal Revenue Service in San Francisco and again reported about the fraudulent tax practices. Thereupon, he was contacted by Revenue agents to whom he supplied, on the basis of the record copies kept of his former employer's book entries, first about 45, and later another 23 fraud allegations. (Tr. 59, 60, 61 and 79, 80 and 91.) Thereupon, husband worked with the agents until the fall of 1947 and the time spent by him

in gathering and supplying the information covered not less than 43 months. (Tr. 81, 82.)

The evidence adduced by petitioners in their arguments II and III (pages 27 to 35) clearly supports the period of 42 months, during which the information as to the tax fraud was supplied by the husband as the evidence referred to on pages 35 to 42, indicates the time spent by the husband on that score may fairly be held to cover 79 months. In any case, the whole of the testimony, the whole of the record, abundantly proves that the time spent by the husband in supplying information as to the tax fraud was for personal services rendered during a period of not less than 36 months and, therefore, they are entitled to income allocation benefits of Section 107(a) of the 1939 Internal Revenue Code.

II.

RESPONDENT CONTENDS THAT THE TAX COURT FINDING, CONTRARY TO PETITIONERS' CONTENTION IS WARRANTED BY THE RECORD.

Respondent asked this Court to uphold the finding of the Tax Court, notwithstanding, not only the unlikeliness but also the impossibility of Agent Shurlock's testimony. Respondent asks this Court to make assumptions *dehors* the record, and make assumptions which would, in effect, stultify all intendments of the Internal Revenue Code. Respondent apparently contends that even though the husband went to the Internal Revenue Service in March 1944 and informed

an officer thereof that a tax fraud was being practiced by his employer, the Internal Revenue Service had shown no interest in the matter until the evidence was presented on a silver platter in the fall of 1947 in the form of 68 or 70 allegations. (Tr. 60, 61, 79, 80, 91.)

Respondent asks this Court to assume that when the husband was advised by the Internal Revenue Service in the spring of 1944 to make copies of the alleged fraudulent book entries of the employer, that was solely for the protection of the husband with the Service demonstrating no interest whatsoever in using such copies for the purpose of recovering taxes due. (Respondent's Brief, page 11.)

Respondent relies on *Barker v. Shaughnessy* (N.D. N.Y.), 48 A.F.T.R. 1301, 1954. In that case the informant was a tax attorney employed by the fraudulent taxpayer as tax advisor who gathered the information on his employer's time, while here the husband did so on his own time (Tr. 49-50.) Barker was paid to do the tax work for his employer, while the husband here was specifically excluded from the tax work by the employer. (Tr. 46.) Barker first went to the Revenue Service using a fictitious name and discussed a hypothetical case based upon tax irregularities of an unnamed corporation. In the instant case, there is not one iota of evidence that husband didn't give his own name, or that he was discussing a hypothetical case, or that he left the fraudulent taxpayer unnamed. All assumptions based upon the record are to the contrary.

Barker died before the expiration of 36 months from his first visit to the Internal Revenue Service and, in consequence, could not have performed personal services for a period of 36 months or more, while in the instant case the husband could, and did, perform the necessary services to bring about the proof of the tax fraud far longer than 36 months.

District Judge Brennan, now Justice of the Supreme Court of the United States, bases his decision, contrary to the claim of Barker's widow, exactly on the distinction between the *Barker* case and the case now before the Court. The memorandum decision gives the facts as follows:

> "H. Leslie Barker was a tax counsel employed by a large corporation and its twelve associated companies. His employment terminated in February 1943, and it is evident that he had been employed as above for some years prior thereto. On November 23, 1942, Barker, using a fictitious name, discussed with a representative of the Intelligence Unit of the Bureau of Internal Revenue at Washington, a hypothetical case based upon tax irregularities of an unnamed corporation and made inquiry as to the payment of an informer's reward. On March 15, 1943, Mr. Barker called at the New York Office of the Bureau, disclosed his correct identity and the names of the corporations involved, in what he believed to be tax irregularities for the years 1940 and 1941. In April 1943 an investigation was started by the Bureau based upon the facts disclosed by Barker. The investigation was lengthy and no doubt complicated. Barker was occasionally consulted in connection therewith, at least until July

18, 1944 when he signed a 'claim for reward' upon the prescribed form, asserting therein his belief that he was entitled to such reward by reason of information furnished by him to Special Agent Sullivan, and other agents associated with him on March 3, 1943 and subsequent dates. The exhibits indicate that the investigation was officially terminated on August 11, 1944 but the final closing was delayed at least two years because of the claims made or the administrative action required.

Mr. Barker died October 17, 1944 and his widow, Helen G. Barker, is the executrix and the sole beneficiary of his estate."

The opinion also sets forth that Barker's estate received an informer's award of $50,000 on November 8, 1948 and an additional amount of $25,000 on February 2, 1949. It is also set forth that Barker's claim for reward was based on

> ". . . information (that) was furnished by me on the 3rd day of March 1943 and subsequent dates . . ."

He died on October 16, 1944 and, therefore, the Court said

> "Even if Barker's services commenced on the occasion of his first visit to Washington on November 3, 1942 and continued until his death on October 16, 1944, the total elapsed time is 13 months short of the 36-month requirement."

In the *Barker* case the Court held that the investigation of the alleged tax fraud by him did not constitute personal services because

"Barker was a full-time employee of a corporation at all the pertinent times herein until February 1943. The nature of his duties is not entirely clear but he is referred to in the stipulated facts as 'tax counsel' and his statement to the agent indicates that he advised or furnished information relative to his employer's tax returns although he may not have had the responsibility for their preparation. His employment was in tax matters and his compensation was earned therefor. It follows that in tax matters his employer alone was entitled to his services rendered in the course of his employment. He may not serve with a divided loyalty. The record here shows that Barker advised the agent that he refused to prepare the 1942 returns because of irregularities which he discovered in the prior returns and that he wrote a letter to his employer to the same effect. We would be naive to conclude that the reasons for such refusal were withheld from the employer. If they were disclosed then the investigation made by Barker must have also been disclosed. In any event it can not be assumed that Barker failed to advise his employer of the discovery of errors or the use of methods designed to enable the consummation of a tax fraud. Here was a large corporation, the actions of the tax or accounting department may well have escaped the attention of the officers or the executive branch. Barker, an experienced and mature attorney-employee, must have known and performed his obligation to his employer. It is fairly inferable that his investigative efforts were made during the course of his employment for which compensation was fully paid. *In effect plaintiff's contention here is for double compen-*

> *sation over the time period of the investigation without giving effect to the agreed value of the services rendered to and paid by the employer.*" (Emphasis ours.)

In the *Barker* case it is apparent that even though the Court felt no need to consider it, nevertheless, Section 107(a) was inapplicable because Barker's estate received more than 80 per cent during the year of 1948. In the instant case, that contention was not and could not be raised.

CONCLUSION.

Petitioners respectfully submit that the Tax Court erred in that it construed the applicable law wrongly and its findings of fact are not supported by the evidence, and, therefore, its decision ought to be reversed and it ought to be ordered that petitioners are entitled to the income allocation benefits of Section 107(a) of the 1939 Internal Revenue Code. (26 U.S.C. 1952 Ed. Sec. 107.)

Dated, Carmel, California,
August 16, 1958.

Respectfully submitted,
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